SUPREME COURT, U. S.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1410

ENSO-GUTZEIT, O/Y, FINN-LINES, LTD. O/Y
and CONNECTICUT TERMINAL CO., INC.,

*Petitioners,*

—against—

ROBERT SIDEREWICZ,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### Statement of the Case

This action was brought to recover damages for personal injuries sustained by the respondent while working as a longshoreman.

The case was tried in the United States District Court for the District of Connecticut before the Hon. J. EDWARD LUMBARD, Chief Judge of the United States Court of Appeals for the Second Circuit, sitting by designation, and a jury.

At the close of respondent's case, the Court granted the petitioner's motion to dismiss the complaint on the basis that a cause of action had not been established.

The United States Court of Appeals for the second Circuit reversed and ordered a new trial (p. 7a-8a).[1]

Petitioners then applied to the Court of Appeals for a rehearing and suggested that a rehearing be held in banc.

The petition for a rehearing was denied (p. 9a) and as no active Circuit Judge requested that a vote be taken on the suggestion that a rehearing be held in banc, that petition was also denied (p. 10a).

## Facts

On the 10th day of December, 1965, the merchant vessel FINNEAGLE was discharging bales of wood pulp at the State Pier, New London, Connecticut (Tr. 4, 43, 48, 93).[2]

The established usage and custom and precise printed Safety and Health Regulations for Longshoring required that each draft be limited to eight bales and that two bale hooks be provided for each bale (Tr. 5-8, 11, 12, 44, 49, 66, 97, 98).

Just prior to the accident an extra ninth bale was tied by rope onto the customary eight bales, creating an unsafe condition (Tr. 15-16, 24, 31, 32, 44, 47, 66, 99). When the draft was landed on the dock the hooks were first removed from the eight bales. The ninth bale was tied to the other eight bales in such a way that the draft had to be lowered further in order to untie the ninth bale (Tr. 17, 44). This

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[1] Numbers in parentheses followed by the letter "a" refer to the pages in the appendix to the petition for a writ of certiorari.

[2] Numbers in parentheses preceded by "Tr." refer to pages of the trial transcript which has been certified by the Clerk of the Court of Appeals and filed in this Court.

resulted in sixteen hooks lying scattered on the dock (Tr. 77).

After the ninth bale was untied, a signal was given and the winchman commenced taking up the falls to which the hooks were attached (Tr. 66, 94). The dangerous method of adding a ninth bale resulted in the hooks being dragged on the dock instead of staying clear, causing one hook to snag in a crevice on the dock (Tr. 17, 18, 44, 45, 66, 67, 77, 78, 109). When the winchman took up the slack on the falls, the hook snapped loose and struck the respondent with great force (Tr. 43, 68).

The winchman testified that he had acted in a careful, proper and prudent manner, free from any negligence, and corroborated respondent's contention that the unsafe condition of the draft was the proximate cause of the accident (Tr. 94, 97, 99, 108, 109).

## Questions Presented

Respondent submits that the questions presented by this case are as follows:

1. Does an unsafe condition brought about as a result of bad practice by longshoremen constitute a breach of warranty of seaworthiness?

2. Does contributory negligence on the part of a fellow longshoreman bar recovery, as a matter of law, for a maritime accident due to breach of warranty of seaworthiness?

3. Under the facts of this case is causal relationship between the unseaworthiness and the injury to respondent a question of fact for the jury?

## ARGUMENT

### POINT I

**The holding by the Court of Appeals does not conflict with this Court's decision in *Usner v. Luckenbach Overseas Corporation, et al.*, 400 U.S. 494, 91 S. Ct. 514 (1971), or with this Court's summary action in *Zim Israel Navigation Co. v. Tarabocchia*, 401 U.S. 930, nor is it detrimental to uniformity of decision under maritime law.**

The Court of Appeals, rather than conflicting with the *Usner* v. *Tarabocchia* decisions, cited them and applied them. The Court simply held that a jury would have to determine whether or not the acts of the longshoremen made "the whole procedure unsafe" (p. 5a) and "If putting nine bales in the draft made the vessel unseaworthy, . . . " (footnote 5, p. 5a).

See:

*Blassingill* v. *Waterman Steamship Corporation*, 336 F.2d 367 (1964).

Petitioners urge a promulgation of a new principle of law which constitutes a radical departure from well settled and uniform law, as pointed out in the opinion of the Court below (footnote 5, p. 5a):

> "5. If putting nine bales in the draft made the vessel unseaworthy, the shipowner would not be saved from liability because it may have been negligent of the stevedoring company to use that technique. Grillea v. United States, 232 F.2d 919, 922-23 (2d Cir. 1956);

Thompson v. Calmar S.S. Corp., 331 F.2d 657, 659 (3rd Cir. 1964); see Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 427-28 (1959)."

Petitioners have gone to great lengths in searching the record for evidence of negligence, which arguments when urged in the Court below were dealt with by the Court in footnote 6 of its opinion as follows (p. 6a):

"6. We refer to the evidence of Bartnicki at App. 16-18 and 41 and plaintiff at App. 77-78 which can be understood as saying that in that specific instance the hooks were still dragging or close to the pier. The apparently conflicting testimony on which appellees rely can possibly be read as referring to a general practice of a longshoreman's gathering the hooks up in his arms before they are returned to the vessel, rather than to the actual and precise events at the time of this accident."

Petitioners' complaint that the Court below failed to be bound by the holding in the *Usner* and *Tarabocchia* cases, *supra*, is contrary to the very language of the opinion, the Court below having stated (p. 5a):

"Usner v. Luckenbach Overseas Corp., supra, holds that an isolated, personal, unforeseeable act of negligence by a fellow longshoreman does not make the shipowner liable on the ground of unseaworthiness, if the condition of the ship, her appurtenances, her cargo and her crew were all satisfactory. See Tarabocchia v. Zim Israel Navigation Co., 446 F.2d 1375 (2d Cir. 1971)."

## POINT II

**The decision by the Court of Appeals for the Second Circuit was in strict conformity with the holding by this Court in *Usner v. Luckenbach Overseas Corporation, et al.*, 400 U.S. 494, 91 S. Ct. 514 (1971).**

**An unsafe condition, irrespective of notice or causation, constitutes breach of warranty of seaworthiness.**

Considering the testimony adduced at the trial and the exhibits offered in evidence, a question of fact was raised as to whether or not the draft in question created an unsafe condition and was therefore unseaworthy.

*Skibinski* v. *Waterman Steamship Corporation*, 360 F.2d 539;
*Blassingill* v. *Waterman Steamship Corporation*, 366 F.2d 367 (1964);
*Radovich* v. *Cunard Steamship Co.*, 364 F.2d 149 (1966);
*LaCapria* v. *Compagnie Maritime Belge*, 427 F.2d 244 (1970).

The Court of Appeals found as follows (4a, 5a):

"Plaintiff's proof on this point is not uncontroverted, but there was clearly enough to go to the jury. One witness testified that 'two hooks have always been the rule,' that it is customary to hook each bale, and that it is not usual for the hooks to drag when there are only eight bales. Another testified that eight bales is the 'standard procedure,' that '[w]hen the draft is landing with the nine [bales], you have problems with the hooks' '[b]ecause the hook contains the lifting ap-

paratus has to be dropped lower to take the rope sling off * * *,' and that when hooks drag along the dock that is a competent producing cause for the hooks catching. Plaintiff's own evidence was that the custom and usage was to use eight bales with two hooks to the bale; that it is a dangerous practice to use nine bales; and that if you do use nine bales '[y]ou have to lower the cargo hooks down around two more feet * * *' or 'from 2 to 3 feet more than you normally do.'[4] This testimony, if believed, was enough to ground a verdict that the addition of the ninth bale made the whole procedure unsafe."

In the case of *Usner* v. *Luckenbach Overseas Corporation, et al.*, 400 U.S. 494, 91 S. Ct. 514 (1971), this Court indicated that there would be no liability for unseaworthiness if the accident in question were caused by the instantaneous negligent acts of a longshoreman which did not ripen into an unsafe condition. Thus, in *Usner*, there was nothing defective about the flooring nor the winch, or the sling which struck the plaintiff.

In the case at bar, a jury could find that the accident was caused by the fact that the draft was improperly loaded and was thus not reasonably fit and safe to be unloaded without danger of injury.

The opinion of the Court in the *Usner* case, *supra*, cites with approval the decision in *Mascuilli* v. *United States*, 387 U.S. 237, 87A S. Ct. 1705 (footnote 19).

In *Mascuilli*, *supra*, the accident resulted from a tight line condition which was created by the longshoreman. The tight line condition was held to be unseaworthy, just as

the improperly loaded draft could be found in the instant case to be unseaworthy.

The fact that the draft was loaded shortly before the accident occurred does not relieve the shipowner from its obligation to provide a seaworthy vessel.

> *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926 (1960).

See also:

> *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, 79 S. Ct. 445;
> *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 64 S. Ct. 455;
> *Grillea* v. *United States*, 232 F.2d 919.

This Court in *Usner* v. *Luckenbach Overseas Corporation, et al., supra*, stated in part as follows:

> "A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective,[13] her appurtenances in disrepair,[14] * * * *The method of loading her cargo*, or the manner of its stowage, might be improper.[17] For any of these reasons, or others, a vessel might not be reasonably fit for her intended purpose." (Emphasis supplied.)

The applicable footnotes 13, 14 and 17 are as follows:

> *Mahnich* v. *Southern S.S. Co., supra;*
> *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85;
> *A. & G. Stevedores* v. *Ellerman Lines*, 369 U.S. 355;
> *Gutierrez* v. *Waterman S.S. Co.*, 373 U.S. 206.

See also:

*LaCapria* v. *Compagnie Maritime Belge, supra;*
*DeGioia* v. *United States Lines Company,* 304 F.2d 421 (1962);
*Robillard* v. *A. L. Burbank & Co.,* 186 F. Supp. 193.

## POINT III

**There is nothing in the record to support the contention that a sole isolated act of negligence by a longshoreman was the cause of the accident.**

**Contributory negligence on the part of a fellow longshoreman does not bar recovery, as a matter of law, for a maritime accident due to breach of warranty of seaworthiness.**

A shipowner is not immune from liability for injuries resulting from unseaworthiness brought about by consecutive negligent acts of fellow employees. Negligent acts can and in this case did create an unseaworthy condition.

The respondent's fellow longshoremen here added a ninth bale to a draft and thus created the condition complained of, that is a dangerous, unseaworthy draft.

In the case of *Thompson* v. *Calmar Steamship Corporation,* 331 F.2d 657 (1964) the Court stated at page 659:

"Further, the unseaworthiness of a vessel or its equipment may arise from acts of the longshoremen crew or, indeed, of the injured longshoreman himself. Grillea v. United States, 232 F.2d 919 (2d Cir. 1956); Knox v. United States Lines Company, 294 F.2d 354 (3d

Cir. 1961); Smith v. Lauritzen, 201 F. Supp. 663 (E.D. Pa. 1962)."

See also:

*Reid* v. *Quebec Paper Sales & Transportation Company,* 340 F.2d 34 (1965).

In the case of *Skibinski* v. *Waterman Steamship Corporation, supra,* the Court stated at page 542:

"[6] This case also presents the question of whether the defect 'should be considered as an incident in a continuous course of operation' and not as an unfitness of the ship. Grillea v. United States, 232 F.2d 919, 922 (2d Cir. 1956).

In defining unseaworthiness we are not concerned with the conduct or process by which fitness is changed to unfitness. Our focus is upon the resulting condition of the ship. See Puddu v. Royal Netherlands Steamship Company, 303 F.2d 752, 757 (2d Cir.), cert. denied, 371 U.S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 (1962) (Hays, J., concurring).'

Here, the longshoremen, by improperly using an open mouth hook, fashioned an apparatus which was patently unsuitable for the job to which it was put."

## POINT IV

**The concept of unseaworthiness expressed by this Court in the *Usner* case, *supra*, has been completely adhered to by the court below.**

**The question of causal relationship under the facts presented was a factual issue to be determined by a jury.**

There was ample evidence in the record from which a jury could determine that the accident was proximately caused by the unsafe method of unloading the cargo or the unseaworthy draft.

Respondent testified as follows (Tr. 66):

> "Q. Just before you were injured, what is the last thing you remember happening on the dock? A. Well, the load that came over there was nine bales and eight of these bales had two hooks in each one and the ninth one held with a rope and this was attached to the cargo hooks. The bales came down on the dock and it a normal thing when they put that odd one on they do it later and you have to take that rope sling off the cargo hook and you have to lower it down more so one guy can reach up and take it off the cargo hook. When they had done this it left the loose hooks laying loose around the dock."

Respondent further testified (Tr. 77, 78):

> "Q. What happened to the hooks? A. Because of the nylon choker on the ninth bale, they had to lower the hook down and let the sixteen flange hooks laying all the way around the dock. After they were all un-

hooked, I took and pulled the rope together which brings the hooks closer to each other and it started to go up and caught on the caplog."

One of the witnesses, Stanley Bartnicki, testified (Tr. 17, 18):

"Q. Do you know what made the eight hooks drag? A. Yes because being the ropes were low enough to get it off the hook it had to drop it down lower to get that sling off and then you throw the sling on the side and wait until it is empty and throw it back up again."

Daniel Murphy, the winchman, testified (Tr. 109):

"Q. When hooks drag along the dock, is that a competent producing cause for the hooks catching? A. Yes, it is."

## CONCLUSION

The decision by the United States Court of Appeals for the Second Circuit clearly demonstrates that it does not conflict with any decisions by this Court or by the Courts of any other Circuit, nor does it substantially affect or change any principles of maritime law.

The petition for a writ of certiorari should be denied.

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